

No. 43784-8-II

**COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON**

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DIVISION II
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STATE OF WASHINGTON
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Lewis County Superior Court
Cause No. 11-1-00980-1

STATE OF WASHINGTON

Plaintiff/Respondent

vs.

MARK E. D'ENTREMONT

Defendant/Appellant

APPELLANT'S INITIAL BRIEF

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ORIGINAL

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Appellant Mark E. D'Entremont hereby appeals the following decisions of the Superior Court of Lewis County.

DECISION BELOW

On June 6, 2012, the Superior Court of Lewis County, Judge James Lawler, entered a ruling against Defendant based on evidence presented at a CrR 3.6 hearing. The court later entered Findings of Fact and Conclusions of Law on July 6, 2012. Subsequently, on July 27, 2012 the court did a stipulated bench trial and found the defendant guilty of Manufacture of Marijuana and Felony Possession of Marijuana.

ASSIGNMENTS OF ERROR

- I. The trial court erred in concluding that probable cause existed for a search warrant prior to the detectives entry onto the property just based on the Crime Stoppers tip, the electric records and the observations of no snow on the roof.
- II. The trial court erred by concluding that the Anonymous Crime Stopper tip satisfied the *Aguilar-Spinelli* test.
- III. The trial erred in concluding that the detectives entry onto the property was lawful.
- IV. The trial court erred in concluding that the detectives behaved liked reasonably respective citizens and did not engage in any inappropriate behavior while on the property other than peering through the hole in the wall.
- V. The trial erred in concluding that the odor of marijuana was lawfully obtained evidence.

- VI. Mr. D'Entremont claims that his right to privacy under Article I, Section 7 of the Washington State Constitution was violated.
- VII. The trial court erred in concluding that the detectives' entry into the home's curtilage violated the occupants' reasonable expectation of privacy.
- VIII. The trial court abused its discretion by not finding that the detectives conduct constituted an illegal search.

ISSUES

1. Whether there was probable cause for the issuance of the warrant?
2. Whether the observations made by the detectives contained in the affidavit supporting the search warrant were made in the course of an unlawful search by violating the occupants' reasonable expectations of privacy?

BACKGROUND

During the last week of November 2010, Detective Engelbertson of the Lewis County Sheriff's Office received a Crime Stoppers tip indicating the defendant Mark D'Entremont owned a residence at 122 McAtee Road in Centralia and that he and a caretaker named Robert Mitchum were growing non medical marijuana in the middle outbuilding on the property. On November 23, 2010 Detective Elder and Detective

Engelbertson drove by the residence to view the property. Detective Engelbertson also checked power records for the property for the previous twelve (12) month period. On November 24, 2010, Detectives Engelbertson and Kimsey drove to the residence to contact the occupant and observed a gold or brown truck parked in front of the center outbuilding. The vehicle was running but was unoccupied. There was snow on the roof of the surrounding buildings but not on the roof of the middle outbuilding. The detectives surveilled the property for twenty (20) minutes before the vehicle left. Shortly thereafter, the detectives drove onto the property and went straight to the middle outbuilding and knocked on the door. The detectives could hear what they believed to be fans. Detective Engelbertson then looked through a very small hole in the outbuilding, approximately fifteen (15) inches off the ground. By looking through the small hole Detective Engelbertson was allegedly able to see grow lights, fertilizer, vent work and a room with light coming out from underneath the door. CP: 5-17 Memornadum: page 1 lines 18 through page 2 line 10.

After making these observations, Detective Kimsey indicated that he smelled the odor of growing marijuana. Based on the foregoing

information, Detective Engelbertson applied for a search warrant. CP: 5-17 Memorandum: page 2 lines 11-14.

The State charged Mr. D'Entremont on December 30, 2011 with Manufacture of Marijuana. CP: 1-3. On April 25, 2012, defendant D'Entremont filed a Motion To Suppress Evidence and the matter was set for a CrR 3.6 hearing. CP: 4. The State filed an Amended Information on May 25, 2012 listing an additional count of Possession of a Controlled Substance – Felony Marijuana. CP: 18-20. The CrR 3.6 hearing was held on June 7, 2012 and the trial court denied the defendant's motion. The Findings of Fact and Conclusions of Law were entered on June 29, 2012. CP: 36-40. A stipulated bench trial was held on July 27, 2012 and Findings of Fact and Conclusions of Law were entered on that date. CP:41-45.

LEGAL ARGUMENTS

I. WHETHER THERE WAS PROBABLE CAUSE FOR THE ISSUANCE OF THE WARRANT?

In the present case the trial court concluded that probable cause existed for a search warrant prior to and independent from any entry onto the defendant's property. The trial court based that conclusion on the facts

contained in the anonymous tip, the elevated power usage and the lack of snow on the roof of the outbuilding. CP: 36-40.

The warrant clause of the Fourth Amendment to the United States Constitution and Article I, Section 7 of our state constitution require that a trial court issue a search warrant only on a determination of probable cause State v. Vickers, 148 Wn.2d 91, 108, 59 P.3d 58 (2002). Probable cause requires a nexus between (1) the criminal activity and the items to be seized and (2) the items to be seized and the place to be searched. State v. Thein, 138 Wn.2d 133, 140, 977 P.2d 582 (1999). The court's review is limited to the four corners of the probable cause affidavit State v. Neth, 165 Wn.2d 177, 182, 196 P.3d 658 (2008).

Probable cause exists where the search warrant affidavit sets forth facts and circumstances sufficient to establish a reasonable inference that the defendant is involved in criminal activity and that evidence of the criminal activity can be found at the place to be searched. Search warrant 10Y215 in this case is not based in probable cause.

Search warrant 10Y215 sought authority to enter the property and search the structures and seize property. CP: Exhibit 1, from 3.6 hearing. As probable cause, the application alleged:

On November 23, 2010 the Lewis County's Sheriff's Office received an anonymous tip through Lewis County Crime Stoppers where an individual said there was a marijuana grow operation at 122 McAtee Road, Centralia, Lewis County, Washington. The tipster stated the marijuana grow was not for medical purposes and was a very large marijuana grow and was located in a large metal outbuilding on the property and specified it was the middle outbuilding where the grow was taking place. CP: Exhibit 2, from 3.6 hearing, Affidavit Telephonic Search Warrant.

Also on November 23, 2010 law enforcement conducted surveillance on the property. Due to the cold weather and snow on the ground and roofs, it was noticed that on the center building there was no snow on the roof, but there was on the surrounding roofs. Detective Englebertson had also checked the power records received from Centralia City Light. In the detective's opinion the power consumption was elevated and that he indicated that it was more suspicious that there was little fluctuation from the winter to summer months. CP: Exhibit 2, from 3.6 hearing, Affidavit Telephonic Search Warrant.

On November 24, 2010, Detectives Kimsey and Englebertson went

to the property to contact the occupant of the residence. They surveilled the property for approximately twenty (20) minutes. They observed a truck unoccupied but running parked in the driveway in front of the middle garage building. They observed the vehicle leave. After the vehicle left, the detectives pulled onto the property and approached the middle garage building. After knocking on the door, Detective Englebertson could hear fans or equipment running inside the outbuilding. The detective then looked through a hole in the metal in the front of the building. After looking through the hole, he could see grow lights, fertilizer, venting duct work and what appeared to be a room built inside the metal shop with light coming out from underneath the door. During this time Detective Englebertson was informed by Detective Kimsey that he could smell the odor of growing marijuana. CP: Exhibit 2, from 3.6 hearing, Affidavit Telephonic Search Warrant.

Search warrants must be based upon probable cause. Warrants based on less than probable cause are void. Seattle v. McReady, 123 Wn.2d 260, 868 P.2d 134, (1994). An affidavit establishes probable cause for a search warrant if it contains facts that allow a reasonable person to conclude that the defendant is probably involved in criminal activity,

evidence of which will be found at the place to be searched. State v. Young, 123 Wn.2d 173, 195, 867 P.2d 593 (1994). A review of Washington cases show that the facts of this case fall short of the standards established for probable cause in this context.

The anonymous tip here fails as a basis for probable cause because it does not meet the 2-prong test of Aguilar-Spinelli. Spinelli v. United States, 393 U.S. 410, 413, 21 L.Ed.2d 637, 89 S.Ct. 584 (1969); Aguilar v. Texas, 378 U.S. 108, 114, 12 L.Ed.2d 723, 84 S.Ct. 1509 (1964); State v. Murray, 110 Wn.2d 706, 711, 757 P.2d 487 (1988). This test requires the informant's basis of knowledge and veracity be established. Murray, 110 Wn.2d at 711. However, if a police investigation reveals suspicious activity along the lines of the criminal behavior proposed by the informant, then the corroborating investigation may replace the requirements of Aguilar-Spinelli. State v. Jackson, 102 Wn.2d 432, 438, 688 P.2d 136 (1984). More than public or innocuous facts must be corroborated, however. Jackson, 102 Wn.2d at 438.

Here, the police investigation corroborated the address given by the informant, discovered elevated electrical consumption and no snow on the roof of an outbuilding. These are innocuous facts that do not

necessarily indicate criminal activity. Huft, 106 Wn.2d at 211.

Nor does the balance of the investigation corroborate the tip to establish probable cause. The discussion of the electrical usage is ambiguous on its face. The only mention is of elevated use. CP: Exhibit 2, from 3.6 hearing, Affidavit Telephonic Search Warrant. It is innocuous absent some explanation of the significance of how the detective considered it to be elevated. The photographs entered at the CrR 3.6 hearing, exhibits 3-9, illustrate the number of buildings on the property and the size of the buildings of the property. Detective Englebertson did not compare the power records to other similar properties. He had no idea what the square footage was. RP: 20, lines 2-9 and lines 2-25; RP: 21, lines 1-3. He had no idea of what type of business might be operating on the property. RP: 26, lines 16-22. In this case, absent further information to allow the court to conclude that these particular figures are suggestive of crime, there are too many other explanations for the use of more than average electricity. Washington law here is well established. See e.g., State v. White, 44 Wn.App. 215 (1986); State v. Huft, 106 Wn.2d 206 (1986); State v. McPherson, 40 Wn.App. 298 (1985); State v. Rakosky, 79 Wn.App. 229 (1985); State v. Young, 123 Wn.2d 173, 196, 867 P.2d 593

(1994). An analysis of the fact patterns in these cases shows that the warrant here falls far below minimum standards:

White	Huft	McPherson	Rakosky	Young
<ul style="list-style-type: none"> • <i>citizen informant</i> <ul style="list-style-type: none"> • bright lights emanating from garage • noises from a fan in the garage • heavy foot and vehicle traffic • visitors' stays short in duration • garage windows covered • twofold increase in power consumption over two-month period <p><i>NO PROBABLE CAUSE</i></p>	<ul style="list-style-type: none"> • <i>confidential informant</i> <ul style="list-style-type: none"> • increased power consumption • citizen informant • police corroboration of innocuous facts • "extremely high-intensity light" emitting from basement window <p><i>NO PROBABLE CAUSE</i></p>	<ul style="list-style-type: none"> • <i>anonymous tip</i> <ul style="list-style-type: none"> • condensation on windows • potting soil piled next to garage door • black plastic covering garage door windows • two- to threefold increase in power consumption <p><i>NO PROBABLE CAUSE</i></p>	<ul style="list-style-type: none"> • <i>electric wires on fences and gates, but no livestock</i> <ul style="list-style-type: none"> • two large guard dogs • large windowless shed with no vehicle tracks to and from, only footprints • snow did not accumulate on shed • owner of property had prior marijuana offense and alias • power records placed under false name • three- to fourfold increase in power consumption • lack of continuous occupancy at property <p><i>NO PROBABLE CAUSE</i></p>	<ul style="list-style-type: none"> • <i>anonymous tip</i> <ul style="list-style-type: none"> • dramatic increase in electric consumption over last 3 years • no large electric appliances • basement windows constantly covered <p><i>NO PROBABLE CAUSE</i></p>

The cases presented in the above table are similar to the present

case yet no probable cause was found. In Rakosky, a case that also dealt with lack of snow on the roof, and had more factually significant indicators than the present case, the court also found no probable cause, therefore, the probable cause determination in this must be reversed and the evidence seized under the warrant excluded. State v. White, 97 Wn.2d 92, 110, 640 P.2d 1061 (1982).

II. WHETHER THE OBSERVATIONS MADE BY THE
DETECTIVES CONTAINED IN THE AFFIDAVIT
SUPPORTING THE SEARCH WARRANT WERE
MADE IN THE COURSE OF AN UNLAWFUL SEARCH
BY VIOLATING THE OCCUPANTS' REASONABLE
EXPECTATIONS OF PRIVACY?

As previously indicated, prior to law enforcement entering the property, the only information that they had received on November 23, 2010 was from an anonymous tip. Detectives Engelbertson and Elder surveilled the property on that same day and noted no snow on the roof of the outbuilding and had reviewed power records which indicated consistent elevated use for the last year. CP: Exhibit 2 Search Warrant Affidavit, for 3.6 hearing. It should be noted that during this surveillance

nothing is noted in the warrant that indicates the detectives observed any criminal activity i.e., people coming or going from the property, smell, containers or other items commonly associated with a marijuana grow.

The detectives went out to the property the following day, November 24, 2010. The detectives surveilled the property for 20-30 minutes. During that time frame neither detective observed any criminal activity from their observation point. RP: 21, lines 4-11; RP: 33, lines 24-25; RP: 34, lines 1-2.

After sitting there for 20-30 minutes they decided to go do a “knock and talk”. RP: 23, lines 1-23. During this time frame the detectives had been observing a truck that was parked in front of the middle outbuilding running. After they observed the vehicle leave, they then entered the property to conduct a “knock and talk”. RP: 22, lines 7-14 and 21-25; RP:23, lines 17-19; RP: 35, lines 1-6. Detective Kimsey also testified that he knew that he was entering onto private property, without a warrant and went directly to the outbuilding after waiting for the truck to leave. RP: 35, lines 13-25.

When they entered the property, Detective Engelbertson acknowledged he did not have probable cause for a warrant, was entering

on private property and did not go straight to the residence. RP: 25, lines 10-19. In fact they parked away from the residence (See Exhibit 6 from the CrR 3.6 hearing. RP: 26, lines 10-13) and walked directly to the shop and knocked on the door, then they went to the residence and then back to the shop. It wasn't until going back to the shop the second time that the detectives got a three second whiff of smell. RP: 32, lines 1-16.

The photographs admitted at the CrR 3.6 hearing as R exhibits 4-9 illustrate the huge driveway as described by Detective Kimsey, RP: 35, lines 13-25, and the distance from the residence that law enforcement parked their vehicle. The pictures show that the detectives could have parked very close to the residence and that there was a direct access-way leading to the residence. Instead, as illustrated in the photographic exhibits, the detectives chose to park quite a distance from the residence and go directly to the outbuilding.

It is well-established that if information contained in an affidavit of probable cause for a search warrant was obtained by an unconstitutional search, the information may not be used to support the warrant. State v. Johnson 75 Wn.App. 692, 879 P.2d 984 (1994). The affidavit in this case relies on evidence gathered by the detectives illegal conduct on the

property. It is apparent from the affidavit in support of the search warrant CP Exhibit No.2 from the CrR3.6 hearing, that the Detectives in this case entered the property for the express, and sole purpose of searching for a marijuana grow in order to obtain a search warrant. Warrantless searches are per se unreasonable under the Fourth Amendment of the United States Constitution and Article I, Section 7 of the Washington State Constitution, “unless they fall within a few specific and well delineated exceptions.” State vs. Myers, 117, Wn.2d 332, 337, 815 P.2d 761 (1991).

The facts of this case present your classic “curtilage” or “open view” issue which has been addressed by the Washington courts numerous times. The Washington Supreme Court discussed the “open view” doctrine at length in State v. Seagull, 95 Wn.2d 898, 902, 632 P.2d 44 (1981). Under the open view doctrine, no search occurs when a law enforcement officer detects something by using one or more of his or her senses while lawfully present at a vantage point where their senses are used. Seagull, 95 Wn.2d at 901. Thus an officer on legitimate police business is free to use all of his or her senses in entering areas of the curtilage that are impliedly open to the public. Seagull, 95 Wn.2d at 902. An officer is allowed the same basis to intrude as a “reasonably respectful

citizen.” Seagull, 95 Wn.2d at 902 (citing United States v. Vilholti, 323 F. Supp. 425, 431 (S.D.N.Y.). Any substantial departure from the access route or particularly intrusive method of viewing, however, will exceed the scope of the implied invitation and intrude on a reasonable expectation of privacy, and constitute an unlawful search. Seagull, 95 Wn.2d at 903.

In Seagull, the court adopted seven nonexclusive factors to aid the court in determining whether an officer’s conduct was unreasonably intrusive such that it exceeded the scope of the implied invitation: 1) whether the officer spied into the house; 2) acted secretly; 3) acted after dark; 4) used the most direct access route; 5) tried to contact the resident; 6) created an artificial vantage point; and 7) made the discovery accidentally. Seagull, 95 Wn.2d at 905.

Applying the factors from Seagull to the facts of this case it is clear that Detective Engelbertson 1) avoided contact with occupants; and 2) acted secretly (because the detectives knew someone was at the property as they had observed a vehicle, running in the driveway and waited 20-30 minutes while that person was there and waited until that person left to attempt to make contact on the property); 3) did not go directly to the house (they parked away from the house and did not take the most direct

access way to the house; 4) did not try to contact the resident (they went straight to the out building where they believed the marijuana grow to be; 5) created an artificial vantage point by having to squat or kneel and look through a small hole; and 6) did not discover it accidentally because he crouched down to spy through a small hole in a wall.

As the rule in Seagull states, an officer on legitimate police business can enter areas of the curtilage impliedly open to the public. In deciding whether the officer is on legitimate police business, his or her conduct prior to reaching the “lawful vantage point” is relevant. In this case Detective Engelbertson may initially have had legitimate business to go to the property, but by waiting until the occupant left to approach the property, parking away from the residence and most direct route to the house, and by going directly to the outbuilding and looking through a small hole in which he had to make a serious effort in bending or kneeling to view, the detective deliberately set about searching for evidence without a warrant in an unreasonably intrusive manner and exceeded the scope of the implied invitation open to a reasonably respectful citizen.

State v. Ross, 141 Wn.2d 304, 4 P.3d 130 (2000) is a similar case to the case at bar in that law enforcement had received a tip for a

marijuana grow and went to the property to investigate. In Ross, the court first examined whether the officers entered on “legitimate police business”. The court looked at State v. Johnson 75 Wn.App. 692, 879 P.2d 984 (1994) wherein the Court of Appeals held that the DEA agents never attempted to approach the house or contact the occupants, their only purpose was to conduct a search and gain information by trespassing on private property. Just as in Johnson and Ross, the detectives here entered Mr. D’Entremont’s property for the express, and sole, purpose of searching for evidence of a marijuana grow operation in order to obtain a search warrant. The detectives indicate doing a “knock and talk” RP: 22, lines 7-14 and 21-25; RP:23, lines 17-19; RP: 35, lines 1-6, because at this point they do not have probable cause to get a warrant. The “knock and talk” procedure has been held by numerous cases to be considered “legitimate police business”, however, law enforcement cannot enter to search for evidence without a warrant. By definition, a “knock and talk” is not a search for evidence unless the owner consents to a search. In State v. Ferrier, 136 Wn.2d 103, 960 P.2d 927 (1998). In Ferrier, the Washington Supreme Court approved of “knock and talk” procedures. In doing so, law enforcement must observe the narrow strictures of not

excluding the narrow scope of the consensual contact not wander away from the most direct path to the front door. State v. Rose 128 Wn.2d 388, 909 P.2d 280 (1996).

As Justice Talmadge stated in his concurrence on Ross, while “knock and talk” procedures are legitimate, we should reject any notion that police or police business have an implied invitation to invade one’s curtilage to perform a search for evidence so long as they act like “reasonably respectful citizens.” The rationale for the police to enter private property without a warrant should be narrowly grounded in community caretaking and consensual contacts between the police and the public, not an expansive notion of “legitimate police business” that includes warrantless searches for evidence of a crime. State v. Ross at 319.

CONCLUSION

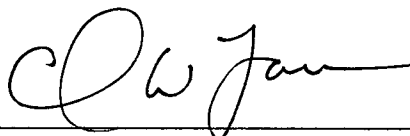
There is no probable cause to support the warrant. The information in the anonymous tip, the lack of snow on the roof and the elevated power usage is insufficient to support a finding of probable cause. Any information gained by the detectives’ entry onto the property was obtained in violation of Mr. D’Entremont’s constitutional rights to privacy and thus

are excluded, therefore there is insufficient evidence to establish probable cause for the warrant.

For the foregoing reasons, the warrant should be invalidated and the charges dismissed.

DATED this 4th day of November, 2012.

LAW OFFICE OF CHARLES W. LANE IV

A handwritten signature in cursive script, appearing to read 'C. W. Lane', written in black ink.

CHARLES W. LANE IV, WSBA #25022
Attorney for Appellant

No. 43784-8-II

**COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON**

Lewis County Superior Court
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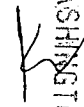
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Plaintiff/Respondent

vs.

MARK E. D'ENTREMONT

Defendant/Appellant

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DECLARATION OF SERVICE

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ORIGINAL

COMES NOW, NAVEVE K. VAN HOOFF, under penalty of
perjury of the Laws of the State of Washington and declares as follows:


1. I am over the age of 18 years of age and not a party to the
above-entitled action. I am competent to be a witness in the action.

2. I certify that on November 5, 2012, I served a true and
correct copy of the **Appellant's Initial Brief** in the above entitled action,
on Sara Beigh, by personally leaving the same with the receptionist at the
Lewis County Prosecuting Attorney's Office.

3. I certify that on November 5, 2012, I served a true and
correct copy of the **Appellant's Initial Brief** in the above entitled action,
by placing said document in the United States Mail, postage prepaid,
addressed to the following:

Mark E. D'Entremont
304 W. Reynolds Avenue
Centralia, WA 98531

DATED this 5th day of November, 2012 at Olympia, Washington.



NAVIEVE K. VAN HOOFF
Paralegal To Charles W. Lane, IV